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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THE STATE OF ARIZONA,)

Plaintiff,)

vs.)

STEVEN CARROLL DEMOCKER,)

Defendant.)

A300
No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
WEDNESDAY, DECEMBER 17, 2009
2:29 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTIONS

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

DECEMBER 17, 2009
2:29 P.M.

HEARING ON MOTIONS

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER.

FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY
HAMMOND, AND MS. ANN CHAPMAN.

THE COURT: This is CR 2008-1339, State versus
DeMocker. Mr. DeMocker is present. Mr. Sears and
Mr. Hammond representing him. Mr. Butner is here from the
County Attorney's Office, representing the State.

I've had a chance to review the proposed
jury questionnaire that you had, Mr. Sears. Thank you for
allowing me to do that ahead of time.

Where would you like to take the hearing,
from this point?

MR. SEARS: Thank you.

Judge, before we talk about that, I did
want to bring up one matter that is about to happen here,
because I think it is in a way related.

We intend to file tomorrow -- we were
hoping to be able to file today, but there's some last-minute
editing going on -- a motion that deals with the capital
issues in this case, and makes a particular recommendation
that the Court consider adopting a procedure similar to the
one that is being used now in New Mexico -- to the extent

1 that they are ever going to do any more capital cases
2 there -- involving separate juries -- one jury impaneled for
3 the trial and, if appropriate, a second jury impaneled for
4 any sentencing phase.

5 What I do have, though, are CDs, one for
6 Mr. Butner and one for the Court. These are the appendices
7 to the motion, and I will bring the motion over tomorrow and
8 get a copy to Mr. Butner electronically.

9 We just wanted to alert you to the filing
10 of this motion and alert the State to the filing of this
11 motion, because it may bear, in part, on how this case
12 ultimately is tried and the configuration of the jury.

13 Other than that, Judge --

14 THE COURT: And the configuration of the jury
15 questionnaire --

16 MR. SEARS: Yes.

17 THE COURT: -- if that were to be granted in
18 part of it.

19 MR. SEARS: Very much so.

20 And we would hope that that motion could
21 be heard in the middle of January. The hearings from the
22 12th through the 15th have been previously scheduled, which
23 would, again, give us time to revisit issues, if revisiting
24 is appropriate after that hearing.

25 With respect to the -- all that I have

1 filed today, of course, is our proposed questionnaire. And
2 then the last page was a one-page summary of the protocol and
3 timeline that we had talked about so extensively last week so
4 that it would be in one place, a summary of the sequence of
5 events and the actual timing of events that we propose in
6 this case. I think we have given you all the information
7 that we have available, essentially, to support this plan.

8 As I said last week, the methodology that
9 we applied to this was the collective experiences not only of
10 counsel but also of Mr. Guastaferro. And what we get -- we
11 receive information on a regular basis from death penalty
12 defense lawyers all over the country, of course. And the
13 idea of jury selection and this kind of voir dire is a topic
14 of great and continuing interest to practitioners on our side
15 of these cases.

16 And so this is a distillation of those
17 experiences, configured a little bit differently to
18 accommodate some of the particular circumstances in Yavapai
19 County -- for example, the presence of the Verde district,
20 the possibility, for example, of having potential jurors from
21 the Verde side report to the Verde side courthouse --

22 THE COURT: On the Verde side. Sure.

23 MR. SEARS: -- to fill out the questionnaire,
24 which would require a little bit of tinkering, indicating
25 that would not be the place of trial, that we're just trying

1 to accommodate their schedules to have them in to a place
2 closer to home to fill out the questionnaire.

3 We tried -- the questionnaire in general,
4 our approach to that -- I don't know how many iterations
5 we've gone through to get to this questionnaire -- but what
6 we tried to do is to combine questions about -- attitudinal
7 questions about the death penalty and particularly the death
8 penalty sentencing process unique to Arizona, the different
9 phases, in a way that was as understandable as we could. And
10 We had non lawyers vet this, to take out the lawyer
11 gobbledygook as much as possible, and there was some last
12 minute gobbledygook removed in there as recently as
13 yesterday. We were hoping to have this done sooner than
14 today.

15 We also tried to capture some questions
16 about pretrial publicity. I'm sure the Court knows full well
17 it is difficult to ask people in a vacuum what they know
18 without telling them what you're afraid they saw or heard.
19 And we've taken out some questions that we had in about
20 particular things -- stories and things in the case -- and
21 replaced them with more general questions, trying to
22 ascertain the degree of which they would look at the places
23 where this case is being covered in the press, and again,
24 based on the press coverage to date. And if this
25 questionnaire is given in April, something may happen between

1 now and April that would cause us to want to revisit those
2 questions.

3 But I have also had difficulty
4 conceptually and practically in voir dire and in
5 questionnaires trying to ask jurors in a careful way whether
6 they know something about the case, without having them blurt
7 out something about that. I think that is one of the reasons
8 to do it in a questionnaire, so if they are going to blurt
9 out something, it is in a questionnaire and not in front of a
10 panel.

11 And also, to ask them what they know
12 without asking them what we don't want them to know. Did you
13 see that story on "20/20"? I think we tried to hit a balance
14 on that.

15 And then finally, we tried, as best we
16 could, to anticipate the kind of hardship issues that all of
17 us, including the Court and Mr. Butner can imagine that
18 people are going to have about the length of trial, the
19 distance from their home to the trial, the issues at the
20 trial, and then all the sort of typical things about child
21 care and employment and physical conditions, again, with the
22 idea that weeding out some of the more extreme cases early on
23 could be useful.

24 The other point -- and I am not sure I
25 made it very artfully last week, but let me see if I can do

1 better today. In the two phases, the week that we set aside
2 for potential jurors to fill out the questionnaires in early
3 April and then the actual summoning of jurors for individual
4 voir dire beginning on May 4, our expectation is this: that
5 we -- to get 450 potential jurors to come in to fill out the
6 questionnaires, we took nine sessions. We took morning and
7 afternoon, Monday through Thursday and morning on Friday
8 morning that week in April, and had 50 come in to get to 450.
9 We think, realistically, that we will get 225 questionnaires
10 well before Friday morning, and we think that it might be
11 appropriate to just stop if we do. That if by Wednesday if
12 we have 225, if we use the phone-in system and have some
13 way -- and I think this could be done -- where the jurors --

14 THE COURT: It could easily be done.

15 MR. SEARS: -- could be told to report on
16 Thursday afternoon at one o'clock, to call the night
17 before -- if we are cutting it off, we can cut it off.

18 THE COURT: That's what they do for standard
19 jurors, for trial jurors.

20 MR. SEARS: Good. And then similarly, we
21 think that the time frame that we have put on the last page
22 of what you have in front of you is the longest time that we
23 think it would take to get 36 qualified jurors from which
24 strikes would be made. We think realistically that using
25 this process we will get a pool of -- we will get to 36 well

1 before the time allotted, and we think the juxtaposition of
2 the questionnaire and the individual voir dire will actually
3 advance that process and make it move more quickly, because
4 we will not need to reinvent the wheel, so to speak, with
5 each group, because of the questionnaires and the
6 questionnaire responses.

7 Even to the extent that people have
8 survived the questionnaires, to be in the pool of people to
9 be brought to court, we still think we will have a lot of
10 information that will allow us to focus the questioning on
11 the things that both sides will want to know about, as
12 opposed to having to start from scratch and ask those
13 questions in some sort of descending order with people.
14 That's been my experience.

15 The last large capital case I did was in
16 federal court in 2003 -- that I actually went to trial on.
17 And we had more jurors than this called, and we were allowed
18 individual sequestered voir dire. But the step that was
19 missing from that process is the one that we think is really
20 important here, which was the idea that the government and
21 the defense would meet with corresponding lists to see if
22 there were people that could be removed from the panel with
23 the Court's approval -- the Court making the final decision
24 on that. But both sides going to the Court and saying that
25 both sides agree, if the Court accepts it, that this juror

1 could be struck for hardship, or for an extreme attitude
2 about the death penalty, or based on some answer about
3 publicity or knowledge of the trial -- or some other factor
4 that might come in, that they're related to somebody in this
5 case or something like that.

6 We didn't put in the questionnaire a list
7 of witnesses. And I thought about it, and I think that
8 probably it might be smart to consider doing that or at least
9 put some identifying information beyond Mr. DeMocker's name
10 early on, because that -- just in my case, one of the more
11 common -- this is my experience -- one of the more common
12 bases for the Court to excuse somebody during general voir
13 dire is any answer that their husband is a detective in the
14 Yavapai County Sheriff's Office that worked on this case or
15 something like that.

16 And there are other questions about that,
17 but witnesses seem to me to be a possible area in which
18 people might have a conflict, because of the size of the
19 witness list in the State's case and I think what will turn
20 out to be a correspondingly long list of witnesses on the
21 defense side. It takes in a lot of the population.

22 And Prescott being Prescott, the
23 possibility of people moving in some concentric circle with
24 some of these groups seems to be great. They could be
25 Prescott College people, they could be law enforcement

1 people, they could be people that live in the Williamson
2 Valley area. There is all kinds of overlapping
3 circumstances, I would think.

4 So I am open to not doing it that way and
5 doing it in general voir dire, but I thought it was something
6 we might want to think about.

7 THE COURT: The couple of occasions that I had
8 to previously use a jury questionnaire, when I was a lawyer,
9 we had lists of the witnesses as part of that. I think it's
10 probably a better idea to have it in than not to have it in,
11 just so that we can see what potential conflicts arise -- or
12 at least have a heads up on the people that do know some of
13 the witnesses.

14 MR. SEARS: By the time we get around to
15 actually sending out the questionnaires, which we talked
16 about, but I would think the summons ought to go out whatever
17 the standard lead time from the jury commissioner is to be
18 returnable that week in April. And by that week in April, I
19 would think we would have a reasonably refined witness list
20 from both sides available to attach to the questionnaire with
21 boxes or something like that.

22 THE COURT: Perhaps we could get Margaret up
23 for five or ten minutes.

24 MR. SEARS: So --

25 THE COURT: Maybe some of the logistical

1 questions we could inquire into with the jury commissioner's
2 office.

3 One thing that I don't know that is
4 reported strongly enough in the preamble is the cautionary
5 note that I would like to have about they're not to do any
6 investigation. I haven't read anything in the Courier, but
7 darn it, now that I know about the case and what it's going
8 to be about, I'm going to go back and look at all the Courier
9 stories that I can find.

10 So I think -- and to the extent that you
11 have me do any video preamble as part of this, that that
12 would be something that I would want to emphasize. I don't
13 want them -- you know, now that they know that they might be
14 called on a jury to suddenly go out and do research and start
15 learning stuff that they shouldn't particularly have prior to
16 coming to trial.

17 MR. SEARS: Your Honor, we have seen -- I am
18 sure you have seen the same articles in cases or a lot of
19 them that we get -- where more and more courts are struggling
20 with jurors who either, during the selection process or worst
21 of all during the trial decide it is easy and undetectable to
22 Google some names or something else and get that information,
23 and there has been some really awful results in cases as a
24 consequence of that kind of behavior, so --

25 THE COURT: Welcome to the world of modern

1 technology, I guess.

2 MR. SEARS: So I think that is a very good
3 idea. And I think if we were going to try and script -- or
4 help you script a presentation to be taped, that would be a
5 very good admonition.

6 THE COURT: I would want both sides to help
7 script anything that I put up that is in addition to whatever
8 the Supreme Court has up there for when they come in and see
9 the Supreme Court's deal and then prior to filling out the
10 questionnaire and what that is all about.

11 I did -- and I told you I am semi-sold on
12 the idea, in particular of the questions relating to hardship
13 and pretrial publicity and other plans. Those are major
14 issues, and I am kind of sold on doing some type of
15 questionnaire, at least with regard to that. This is a much
16 more intensive sort of questionnaire that one hopes would
17 save time if it is approved. I haven't heard -- you know, I
18 know Mr. Butner's previously stated position about this,
19 about doing a questionnaire versus not doing a questionnaire,
20 that we discussed last week. I did see a couple of curious
21 things in there that --

22 MR. BUTNER: Judge.

23 THE COURT: -- the Kelly Yarka case thrown in
24 there and things along those lines that weren't directly on
25 this case. But I can see how it might save some time in

1 pointing at some particular case, as opposed to raising it in
2 some voir dire process.

3 Mr. Butner.

4 MR. BUTNER: Judge, I just got this
5 questionnaire five minutes ago.

6 THE COURT: I am sure you did, and I am not
7 saying --

8 MR. BUTNER: I didn't get a chance to read all
9 the questions.

10 THE COURT: And I am not going to sit here and
11 have you have to address which questions should stay in or
12 which should go out or things like that. I don't know that
13 that's -- or if we do, I am not going to sit in here while we
14 do that.

15 MR. BUTNER: Good. I don't want to do that
16 today. I would hope that we get an opportunity to digest
17 this thing. I flipped through here, and one thing it's like
18 in bold and italicized, you know, which, I'm, like, "Oh, this
19 is great." I do object to that. I will just make that clear
20 for the record.

21 THE COURT: Understand. And there may be some
22 areas where you want to ask some questions that aren't shown
23 in here and things like adding witness lists and stuff like
24 that. It will need to be refined, in any event.

25 Mr. Sears.

1 MR. SEARS: Would it be useful if we provided
2 you and Mr. Butner with this draft in Microsoft Word so that
3 it could be edited?

4 THE COURT: Not me at this point, but
5 Mr. Butner, yes, please.

6 MR. SEARS: You bet.

7 THE COURT: And then I will let you folks send
8 some messages back and forth and see if there are some things
9 that you can agree on or modify this in some way that is more
10 along the lines of an agreement, respecting what Mr. Butner
11 previously said about his general position with regard to --

12 MR. SEARS: Just as long as Mr. Butner doesn't
13 hit the "delete" button when he gets the e-mail and say
14 that's the State's response.

15 MR. BUTNER: When I am behind the computer,
16 anything is possible. I will tell you that. But I won't do
17 it intentionally, I promise.

18 THE COURT: Margaret Merlitz is with the
19 clerk's office and the jury commissioner's office. So
20 that -- and I appreciate her coming down. She indicated she
21 would make herself available for a few minutes, but she is
22 also covering the office, because she is the only one in
23 there, currently.

24 But some of the questions that you may
25 have, she may be able to respond to about what happens

1 currently, what could possibly happen.

2 In general, what we are talking about is,
3 for this first degree murder case, having a -- potentially a
4 group of questionnaires sent or delivered, actually, to a
5 potential jury panel. We are thinking of, because of the
6 length of the trial and because of the nature of pretrial
7 publicity here in the Prescott Tri Cities area, that we may
8 need an exceptionally large group from which to derive the
9 jury ultimately, and we have a trial set to commence May 4 of
10 2010.

11 The thinking is that we may need as many
12 as 400 to 450 total jury panelists. We do not have an
13 assembly room to do all of them at one time. So what we've
14 been thinking about and would appreciate any comments that
15 you might have about bringing them in, 50 -- and I recognize
16 that this probably will not be the only trial that you are
17 dealing with in the time frame that we'll need to call them
18 in -- but bringing them in from Monday through Thursday,
19 about a month before the trial is scheduled, so sometime in
20 the last week of March, first week of April, in there. The
21 proposed dates are the first week of April, I believe. And
22 then having them in groups of 50 fill out a jury
23 questionnaire that will then be copied for them to fill out
24 and just stay in the courthouse or be prohibited from leaving
25 the courthouse until it's filled out, and then turn them in.

1 Hopefully, when we get to the point where
2 we have a sufficient number of people respond and even show
3 up to fill them out, then potentially could cancel the Friday
4 morning or Thursday afternoon, the later parts of the week,
5 by putting it on the call-in system that you have.

6 And then, also, because we are drawing
7 from the whole county, potentially having some of the
8 sessions for people being called in report in Verde, where it
9 is more convenient for jurors who are called from the Verde
10 to appear at the Verde court, fill out the paperwork, turn it
11 in, and then go home and then send those over here -- deliver
12 them over here for copying and review, to the attorneys.

13 Subsequently from that, the group that do
14 show up, fill out the questionnaires, that are not excused
15 for reasons of hardship or other reasons of bias or
16 prejudice, knowing too much about the case and the like, then
17 sending out the summons of who the jurors are that are really
18 going to be called to try the case and have them report here,
19 but in smaller components than the whole panel, so that we
20 can do some more individualized voir dire. That is the
21 proposal that the defense has made.

22 But the trial is set, as I say, for
23 commencing May 4. The proposal to bring them in and for a
24 month before that, so first week of April, I have questions
25 about when the panel would be compiled that would do that, to

1 what extent you'll need to get a larger panel or a special
2 panel outside of the normal group that you send out jury
3 questionnaires -- just the initial jury questionnaire about
4 do you still live here, are you a citizen, do you have your
5 rights, hardship and the type of normal jury questionnaire
6 that you will send out for original qualification.

7 MS. MERLITZ: The original qualification would
8 be done prior to their names actually being in the computer,
9 so they are already qualified as far as being U.S. citizens
10 and not being felons and so on and so forth.

11 THE COURT: Do you shift during the year the
12 panels, though? And if so, does the timing of this have any
13 impact on that?

14 MS. MERLITZ: We will be sending out jury
15 questionnaires again in March, and those jurors will start
16 inputting their information into the computer -- those that
17 are qualified. And they will begin their service effective
18 April 1st of next year.

19 THE COURT: So we are already past that
20 deadline for the proposed timing that we would have this jury
21 panel or these jury panels, if we do it that way?

22 MS. MERLITZ: Correct.

23 THE COURT: Well, that is a positive thing. I
24 was concerned about it kind of coming in between the two
25 dates that we have for the trial versus the assembly of

1 the -- trying to assemble the jury for filling out the
2 questionnaires.

3 Questions, Mr. Sears or Mr. Butner, that
4 you might address to Margaret?

5 MR. SEARS: Thank you.

6 Margaret, as the judge said, we are
7 looking at possibly summoning 450 people to come in and fill
8 out questionnaires. And assuming we do that, to get people
9 to come in that first week in April, what do you think a
10 reasonable lead time to send them those questionnaires, so
11 that you have already got a qualified panel that would
12 otherwise start April 1?

13 MS. MERLITZ: I guess I need clarification --
14 is the jury questionnaire going to go out to --

15 THE COURT: No. Just your standard
16 qualification questionnaire that you send out for jury duty.

17 MS. MERLITZ: Typically what we send out for a
18 regular jury trial is just a summons for them to appear,
19 because those jurors that are summoned are already qualified
20 to sit as jurors -- the basic qualification.

21 THE COURT: But you are saying the basic
22 qualifications questions will go out sometime in probably
23 early March?

24 MS. MERLITZ: We send out 20,000 twice a year.
25 But once those jurors are qualified and they are in the

1 computer system, from those that are qualified, we then send
2 out the jury summons. So the computer will already contain
3 those jurors that are qualified to sit as trial jurors.

4 MR. SEARS: It seems like we are running two
5 concepts pretty close on top of that.

6 To get the April 1 panel qualified, how
7 far back would you estimate you are sending out their
8 qualification questionnaires -- the 20,000?

9 MS. MERLITZ: I am not really quite sure how
10 to answer that question. We send out the 20,000
11 questionnaires both in March, as well as in September. The
12 ones in March, they don't become effective in the computer
13 until April 1st.

14 Those that are sent out in September,
15 don't become effective until October 1st.

16 So those jurors who send in their jury
17 questionnaires can be qualified and be in the jury pool for
18 up to a year. It does take us a long time to enter those
19 jury questionnaires. We try to get about 2000 of them in the
20 system before April 1st, so there would just be a small
21 amount of the newest questionnaires that will be in the
22 system by April 1st.

23 MR. SEARS: The reason I am concerned about
24 this is we had developed a timeline here that had the jurors
25 coming in the week of April 5th through the 9th to fill out

1 the actual questionnaires for this trial.

2 And if you back -- what do you think a
3 reasonable period of time would be to send out special
4 summons -- not special, but a summons directed to jurors
5 to have them come in specifically to fill out the
6 questionnaires -- a week? Two weeks? Ten days?

7 MS. MERLITZ: Typically, there is -- I think
8 there is a ten-day rule in the rules.

9 THE COURT: We usually send them out two weeks
10 to three weeks in advance.

11 MS. MERLITZ: Two weeks in advance, and there
12 is a ten-day minimum amount, unless there is a special
13 circumstance.

14 But I have not dealt with this personally
15 myself, where I have sent out summons for jurors to appear to
16 fill out jury questionnaires. I would think a two-to-three
17 week time period would be good.

18 MR. SEARS: So, I guess the concern is if we
19 are going to try and target a random group of 450 names of
20 the April 1 panel and send out -- and have them come in
21 April 5, and send out the summons two or three weeks before
22 April 5 would take us back to mid-March sometime, you are not
23 going to have April-1 qualified jurors in the system yet, are
24 you?

25 MS. MERLITZ: Correct. It is going to be

1 strictly 9-A and 9-B, actually -- strictly 9-A and 9-B. I
2 will be qualifying for 10-A, so -- for each year we break it
3 up into segments of A and B. So it would be the 10-A group
4 that would be qualified, then, in April, and there would just
5 be a small amount that would be there.

6 So those jurors that would receive a
7 summons to come in to fill out a jury questionnaire would be
8 comprised of those jurors who filled out applications -- or
9 questionnaires, rather -- the latter part of 2008 and early
10 part of 2009.

11 MR. SEARS: Okay. It would have to be that
12 way. I can't think of a way that you could rush the sending
13 to get people qualified before April 1.

14 Am I right in understanding that if a
15 person is summoned for --- what period of time? For four
16 months?

17 MS. MERLITZ: No. A juror, once they are
18 qualified, can actually be in the jury pool for up to a year.
19 So let's say I send out those jury questionnaires and someone
20 turns it in April 1st and I qualify them immediately, they
21 are in the jury pool until March 31st of the following year.

22 MR. BUTNER: Judge, given what has been
23 described -- first of all, I don't think that this is an
24 appropriate schedule for picking a jury. I think that we can
25 do it in a much more expeditious fashion -- particularly, if

1 the Court does decide to use a questionnaire. I mean, one of
2 the purposes of the questionnaire is to screen jurors and
3 eliminate those that aren't qualified.

4 And yet, here we've got basically this
5 extending out further and further all the way, with about at
6 least two to three weeks being used for individual voir dire,
7 15 jurors a day at the courthouse and that kind of thing. It
8 seems to me that quite reasonably this can be compressed
9 somewhat, and we can do that. I mean, it still looks like
10 the defense is planning on spending a month picking a jury in
11 some fashion here.

12 But I do think there is a lot better way
13 to do this. And I don't mean that speed is the goal, either.
14 This is a ridiculously cumbersome process the way it is
15 outlined here. And I think that if we use a jury
16 questionnaire, we are going to get rid of hardship people,
17 we're going to get rid of pretrial publicity people rather
18 quickly, and then we're going to get to the meat of the
19 matter, so to speak, and move things along in a more
20 expeditious fashion.

21 MR. SEARS: A couple of observations. We had
22 set up this timetable with the understanding that it could be
23 adjusted somewhat. But the theory was that when we actually
24 got to the point of conducting voir dire beginning May 4, it
25 would go much more quickly.

1 And we have a schedule that has, at the
2 outside, two weeks of jury selection, not a month, with our
3 expectation -- I think we have even put that in here -- that
4 we would get 36 qualified jurors well before that period of
5 time, particularly if we spent time thinking about questions
6 that went beyond hardship and pretrial publicity and touched
7 upon death penalty attitudes, which, in our experience,
8 Judge, produced today, in 2009 and 2010, surprisingly extreme
9 answers. People are thinking more now about the death
10 penalty because it is in people's minds. It is in the press.
11 It is in the media. There are public forums and debates
12 about different aspects of the death penalty. The
13 exoneration issue, the wrongful conviction issue has become a
14 matter of public discussion.

15 So people have formulated issues about
16 the death penalty ten, fifteen years ago that they wouldn't
17 have necessarily had. They wouldn't have thought about it
18 much. That is our experience.

19 But the reason we had this process
20 beginning as far back as we did is because we wanted to have
21 an orderly opportunity for the people to come in and fill out
22 the questionnaires, the questionnaires to be copied and
23 distributed to both sides and to the Court, for both sides
24 to have a reasonable opportunity -- less than a week, by our
25 schedule -- to go through those and prepare a list and meet

1 and confer, have a date in there somewhere the middle of
2 April for the Court to make the calls on the stipulated
3 strikes and those strikes that both sides feel the Court
4 could do before we ever saw these people, so that when we got
5 to the May session, the number of people that came to court
6 would be reduced significantly by that process. It is not --

7 THE COURT: If I might cut you short a little
8 bit, as I say I don't have a basic problem with the concept
9 of the questionnaire. Some of the tweaking of this and the
10 timing of it, I think we can leave for further discussion.

11 I wanted to make sure that -- Margaret
12 was gracious enough to indicate that she would come here, I
13 just want to make sure that you have any questions that she
14 can answer that I can't, that -- but that you think I ought
15 to know about while she is still here before I excuse her.

16 MR. SEARS: I do. Just one more. It has to
17 do with this idea that jurors are qualified for a year. What
18 we were afraid of, and what we talked about last week when we
19 were here without you, was that if jurors were called and
20 they were going to be asked at the very end of their service,
21 essentially, to extend their service for a lengthy trial,
22 then we weren't sure how to proceed there.

23 If I am understanding what you are saying
24 is you have a pool of thousands of qualified jurors that if
25 you sent out September, they were qualified as of October,

1 roughly?

2 MS. MERLITZ: Currently, we have about
3 somewhere in the 4,000 range of qualified jurors in Yavapai
4 County. There will be jurors whose term will expire March
5 31st, and normally we end their service. So to summon jurors
6 prior to April 1st, I would need to think that through on how
7 we would do that. I don't know if that is possible. So it
8 might make sense to wait until April 1st to send out those
9 summons.

10 MR. SEARS: And have them come in in mid-April
11 instead of in early April to fill out the questionnaires,
12 maybe?

13 MS. MERLITZ: That is what I am thinking.

14 MR. SEARS: Send out an April 1 list, or could
15 you just say now that you are going to not try and use April
16 1 qualified jurors in the pool, and you are going to pick
17 from the group whose terms would expire in the Fall of 2010?

18 MS. MERLITZ: Correct.

19 MR. SEARS: Yeah, 2010.

20 THE COURT: Is there a way to do that, to send
21 them out to people who are not going to term out before May
22 1st or before May 4?

23 MS. MERLITZ: Currently, we have 9-A and 9-B
24 combined. The 9-A group, I will end their service March
25 31st, and then that will just leave the 9-B group, until I

1 merge the 10-A group into it -- or actually, it would be the
2 other way around. 9-B would be merged into 10-A. Does that
3 make sense?

4 THE COURT: And 9-B would normally expire
5 when?

6 MS. MERLITZ: 9-B will expire September 30th.

7 THE COURT: And you are saying that there are
8 probably 15,000, 20,000 people that are in, or are there, in
9 9-B?

10 MS. MERLITZ: We send out 20,000
11 questionnaires. Right now we have about 4500 qualified
12 jurors.

13 THE COURT: So there would be thousands -- up
14 to 4,000 or so that would still be qualified, that this would
15 be well within their term of service?

16 MS. MERLITZ: Correct.

17 MR. HAMMOND: May I ask a question about that?
18 I am Larry Hammond. I am pleased to meet you.

19 THE COURT: Of course.

20 MR. HAMMOND: Will there be people in that
21 group who will -- your 9-B group, who will not have already
22 been summoned at least once to appear?

23 MS. MERLITZ: Those jurors -- there is always
24 a possibility that a juror could have been summoned prior,
25 but if they are not actually used -- in other words, if a

1 trial canceled, their name goes back into the active pool of
2 jurors for reselection for a later time.

3 MR. HAMMOND: And the ones who have served on
4 a jury, once you serve, you're finished?

5 MS. MERLITZ: Correct. Their jury term is
6 complete. And they are not included in that figure I gave of
7 4500.

8 MR. HAMMOND: But it would include people who
9 might have been called and were eliminated without having
10 actually served on the jury?

11 MS. MERLITZ: No. The 4500 are qualified
12 jurors right now. They have not been excused from jury
13 service for one reason or another. They may have been called
14 previously for a trial in any of the divisions, and if that
15 trial canceled, then their name goes back in. So they are
16 still qualified.

17 MR. HAMMOND: So if it cancels -- without them
18 having to actually show up for service?

19 MS. MERLITZ: Correct. Then they still remain
20 a qualified juror. They don't get excused.

21 THE COURT: If they do get called up and
22 actually come in for being seated but are not seated or the
23 trial settles or something like that, do their names go back
24 into the hopper?

25 MS. MERLITZ: Those jurors who actually

1 appear, whether they come into the courtroom or not, their
2 term is complete.

3 MR. SEARS: I wouldn't have thought that. I
4 thought -- maybe I am just thinking from way back, but I
5 thought people got called over and over, again.

6 THE COURT: That has been my experience,
7 Mr. Sears.

8 Any other questions for Margaret,
9 Mr. Butner?

10 MR. BUTNER: No. Thank you.

11 THE COURT: Mr. Hammond? Anybody have any
12 other concerns?

13 MR. HAMMOND: One other question that we
14 talked about, and Your Honor mentioned it a little bit
15 earlier, if we did have jurors come in to fill out the
16 questionnaires, either here or in the Verde Valley in groups
17 of, let's say, 50 -- that is the number that we have been
18 talking about -- obviously, we would need to give them some
19 instruction as each group comes in, and that might be over a
20 several-day period that they would be coming in. We know
21 that there is a standard video that jurors look at because
22 we've looked at it online.

23 MS. MERLITZ: Right. There is an orientation
24 video that talks about a typical jury trial and what they
25 should expect in the courtroom. But as far as filling out a

1 specific questionnaire for the case, we don't have anything
2 that specifically instructs them on that. I would need to
3 check with someone and find out -- I believe Diana in the
4 past --

5 THE COURT: Diana McKinsey, she being our lead
6 jury commissioner.

7 MS. MERLITZ: Right. Diana Brown, formerly
8 McKinsey, I believe may have had -- the bailiffs actually
9 give them instructions, but I would need to clarify that.

10 THE COURT: I have never had Phil give anyone
11 instructions on the jury service.

12 MS. MERLITZ: Okay.

13 MR. HAMMOND: We had thought a little bit
14 about doing a case-specific video that the judge would be the
15 narrator of and that the parties would have worked on to
16 provide a little bit of a case specific overview. And rather
17 than have the judge or someone else have to do it several
18 times during the week, we thought it might be efficient to
19 have a case-specific video that the panel could look at.

20 THE COURT: Do you have any basic issues with
21 regard to that?

22 MS. MERLITZ: No, that sounds fine. If that
23 is what you want to do, that is fine.

24 I would suggest making two copies, if you
25 are going to do that, so we can have one for the Verde and we

1 don't have to make sure the copies come and go.

2 THE COURT: Understand. The new Verde jury
3 assembly room seats how many?

4 MS. MERLITZ: I believe it seats a hundred.
5 And our jury assembly room seats a hundred, also, but not
6 very comfortably.

7 THE COURT: And for filling out paperwork like
8 that, do you have any recommendations or comments about that?

9 MS. MERLITZ: Clipboards would probably be the
10 most efficient way to do that. Because we could set tables
11 up, but then that would limit the space, as well.

12 THE COURT: Sure. With tables set up, how
13 many folks do you think you can get in there?

14 MS. MERLITZ: Half that.

15 THE COURT: So 50?

16 MS. MERLITZ: Correct.

17 THE COURT: All right. Any other questions,
18 gentlemen, before I let Margaret go?

19 Thank you for coming.

20 MR. SEARS: Thank you. It's been very
21 educational.

22 MR. HAMMOND: Thank you.

23 MS. MERLITZ: You are welcome.

24 THE COURT: Thank you. The record can reflect
25 Margaret Merlitz has left.

1 Other things that you think we need to
2 talk about today? I do think Mr. Butner needs a chance to
3 chew on this a little bit and see what questions or position
4 he wants to take on the questions that are posed, what he
5 might wish to add to have an exchange of ideas about that
6 between the two sets of parties.

7 MR. SEARS: I think that is fine, Judge. And
8 we will go back and e-mail this draft to Miss Cowel and
9 Mr. Butner in words that they can work with.

10 I might suggest that just for purposes if
11 they are going to exchange this, we might want to consider
12 using the track changes in Word and redlining the changes.
13 They come back in color. It is easy to deal with.

14 THE COURT: The staff can do that.
15 Mr. Butner, I wouldn't challenge --

16 MR. BUTNER: I was checking to see. I never
17 even heard of that, but Deb says she knows how to do that.

18 MR. SEARS: I was speaking directly to
19 Mr. Butner in the hopes that he might not know how to do
20 that.

21 MR. BUTNER: Do you know how to do that?

22 MR. SEARS: Of course I do.

23 Judge, on a very serious note. One thing
24 that -- and however you want to handle this is certainly the
25 way to go. But I have heard the Court say now several times

1 that you were having an easier time conceptually with the
2 idea of a questionnaire that deals with hardship and pretrial
3 publicity, which would leave, I suppose, the death penalty
4 questions and some of the related questions for further
5 discussion. I could speak to that at any time the Court
6 wants to. And just in general terms --

7 THE COURT: Just so I am clear, I am not
8 saying I don't like your -- the questionnaire. I think it is
9 a well-done questionnaire, as a matter of fact. And to the
10 extent that we send out a questionnaire, those topics that
11 may be able to assist us in doing the jury selection faster,
12 I think would be helpful.

13 I had comments, in some of the previous
14 cases that I had that had the involvement of the jury
15 questionnaire, about feedback from jury panelists, that it
16 was too long. Some of that has to do, I think, with using
17 check boxes versus open-ended sorts of things that require
18 them to then complete something.

19 But some of the questionnaires that I am
20 familiar with, not just in my cases, but in other cases that
21 I was familiar with, had that kind of commentary back from
22 the jury. You get to a point, somewhat, I think, of
23 diminishing returns in the sense of the focus and attention
24 that potential jurors have on filling out this kind of stuff.
25 And if it's backloaded, especially with the death penalty

1 issues, I am not sure that you necessarily want to have it
2 structured in that fashion, where they are losing some degree
3 of focus when you get to something that is important to you,
4 as part of the process.

5 So you know, it was more in the sense of
6 a cautionary note of -- you know, you can include things like
7 the quote that you have and the reference to another case
8 that is out of a different state, involving a different
9 defendant and circumstances that, you know, might concern
10 somebody on either side of this case that perhaps may seem
11 overtly similar. So just to find out how much knowledge they
12 have, but you are increasing the length of it with something
13 that is not focused directly on the allegations contained in
14 the particular case. And so it was more out of a cautionary
15 sense that I was making that comment that we had some
16 feedback in previous cases from the perspective jury that the
17 questionnaire was too long.

18 This is -- I think, you have it at 17
19 pages or so. I frankly don't have a clear recollection of
20 how long the questionnaire was in the case or cases that had
21 the kind of comment that I am talking about, but that is just
22 something I offer as some thinking on the use of jury
23 questionnaires.

24 MR. SEARS: If I could just give you some
25 insight into our thought process on how this was done. This

1 was something that we considered, and we considered the
2 organization. Did we want to do, as you are suggesting, and
3 put the death penalty matters at the top?

4 THE COURT: And I am not suggesting that. I
5 am just saying that that was an issue of focus --

6 MR. SEARS: And I think you will see, when you
7 see our motion that we are filing tomorrow, which is based in
8 great part on this comprehensive study done by something
9 called the "Capital Jury Project," where they actually
10 interviewed over many years jurors who sat in capital trials
11 about their experiences, and particularly the degree to which
12 they understood the process, followed the instructions, or
13 didn't do it. And you get some pretty stunning results from
14 that.

15 And so one of the things that was in our
16 mind when we put this questionnaire together was the doctrine
17 of primacy, that the things that you hear first are the
18 things that stay with you. And the degree to which jurors
19 nationwide -- or at least in the states selected by the
20 Capital Jury Project, which are a cross-section of states
21 with different kinds of sentencing structures, whether they
22 are directed or not. And the commonalty, though, is that
23 people make early decisions long before the process would
24 ever allow them or anticipate they would make the decisions,
25 and they make them for a variety of reasons. I don't want to

1 argue the motion today.

2 But with respect to the questionnaire,
3 what we were looking for were attitudes about capital
4 punishment and about this process and to get some sense early
5 whether people could even grasp the general process for the
6 decision-making in Arizona, which is particularly
7 complicated.

8 THE COURT: I noticed that.

9 MR. SEARS: And the use of boxes and then "if
10 yes, please explain," is about the only way that we have been
11 able, over time, to structure questions.

12 And something you said just a minute ago
13 which really struck a chord with me, which was, one of the
14 things that is very revealing in a questionnaire is a sense
15 of palpable anger that just -- I've saved some from some of
16 my cases -- that comes right off the printed page, where
17 people write -- and they punch a hole through the paper
18 with their pen and they write very large, and they're very
19 angry --

20 THE COURT: Or capital letters?

21 MR. SEARS: A lot of capital letters. And if
22 you gave them a red pen, there would be a lot of red ink on
23 these.

24 And you can learn, sometimes, a great
25 deal about people from the way they write things and the

1 things they say, beyond checking the box. But in order to
2 get them to that, to get people to be encouraged to express
3 themselves, answering some yes or no questions, and then sort
4 of -- well, did you have an attitude about the death penalty
5 before, has it changed, if so why -- that encourages people
6 to think about that particular thing. Yes, I used to be very
7 much in favor of it because of all of the public
8 exonerations, and now I am opposed to it -- or some contrary
9 attitude about the death penalty. This kind of a
10 questionnaire, at least in our experience, and particularly
11 with Mr. Guastaferro, who's done cases in federal and state
12 courts --

13 MR. BUTNER: Can you spell his name.

14 MR. SEARS: G-u-a-s-t-a-f-e-r-r-o.

15 MR. BUTNER: G-u-a-s-t-a-f-e-r-r-o. I'm sorry
16 to interrupt, but thank you very much.

17 MR. SEARS: You are welcome.

18 And what I was about to say was that the
19 importance of getting these attitudes about the death penalty
20 out is, I think, the Court and Mr. Butner will be surprised
21 by the level of interest in these questions, that rather than
22 being targeted, people will find that to be the interesting
23 and most important part of the questionnaire, and will
24 express themselves -- and it's pretty remarkable how
25 attitudes about the death penalty and the fact that there is

1 an attitude about the death penalty has changed over time.

2 THE COURT: That is why I was saying I wasn't
3 saying to put it earlier in the process. I was just
4 commenting generally about length of questionnaires and some
5 of the feedback that I have gotten in the past.

6 Honestly, responses on questionnaires, I
7 don't think would surprise me, given the experience in the
8 use of questionnaires. Some of them become very interesting
9 and curious, but can be really helpful, I think, to both
10 sides in exercising challenges.

11 MR. SEARS: One of the things that I have
12 looked at, if jurors are not willing or capable of filling
13 out a relatively straightforward questionnaire and start
14 putting in answers like "I already answered that," and "I
15 already said that," that is an attitude that comes off the
16 questionnaire that is important. It's difficult, if not
17 impossible to detect during large group voir dire.

18 But you get something from somebody that
19 indicates either a complete sense of confusion or frustration
20 or dissatisfaction with the process, and then you are going
21 to ask that person to sit through a lengthy trial, dealing
22 with hundreds of witnesses and thousands of exhibits, and
23 concepts and multiple issues and arguments, and that person
24 has already demonstrated they can't sit still for an hour and
25 can't fill out a questionnaire, that is something you want to

1 know.

2 THE COURT: Absolutely. And unfortunately, I
3 don't know that we have enough staffing to have the clerk sit
4 by and mark when they are done by -- by what time they are
5 finished, having received it, they are finished with it in X
6 amount of time, which might be an interesting aspect of it,
7 also, Mr. Sears.

8 One other comment that I had about the
9 questionnaire, generally, just based on my quick review of
10 it. It makes reference to particular timing on the trial.
11 And I suppose we need to be somewhat on the same page about
12 what the trial schedule might be like.

13 It makes reference in the questionnaire
14 to having Wednesday, Thursday, Friday schedule only. And I
15 think, you know -- because the impact a case like this has on
16 the whole rest of my calendar, I am not sure that I can or
17 should do just a three-day-a-week trial. I think four days a
18 week, at least on alternating weeks, might be something more
19 appropriate to what I am going to need to do.

20 I need to talk with Judge Brutinel about
21 what assistance he is going to be able to provide to me to
22 cover the other cases that I have that are already set on top
23 of this case. There are some cases already -- assuming that
24 this case goes and goes as scheduled and goes for whatever
25 you think it -- and I guess I need some feedback on that --

1 for 30 days or whatever it is, I am going to have to have
2 some discussion with him about what happens to my other cases
3 and who is going to cover those and how are they going to get
4 covered and to what extent. The faster, in terms of a
5 chronological sense that it goes, it might be better for my
6 management schedule to get it through this with four days a
7 week or alternating four-day weeks with three-days weeks.
8 That leaves me enough time to handle my other assignments and
9 do motion hearings and that sort of thing. But maybe every
10 other week instead of every week.

11 MR. SEARS: That would be terrific.

12 MR. HAMMOND: Maybe we ought to underscore
13 this. We put that schedule in there because of an
14 observation that the Court made months ago when we first
15 talked about this.

16 But I think our very strong preference
17 and probably everybody in this room's preference is to have
18 this go as many days a week as your schedule can tolerate.

19 THE COURT: Five-day week or a four-day week,
20 and that is all dependent on what happens with the rest of my
21 caseload.

22 MR. SEARS: One thing that occurred to us,
23 though, as we were going through this, was that we asked
24 jurors about specific plans and commitments. And even in
25 relatively routine cases, you know, in five or six-day

1 trials, my experience has been we tell the jurors a longer
2 date beyond that, so that if the trial runs over a day or
3 two, we're not -- I had a Maricopa County case years ago
4 where a juror sent a note to the judge saying "What's the
5 fine if I just leave now?" He had a business deal back East,
6 and he said "If it is a reasonable fine, I will just pay it
7 if you excuse me now" -- during deliberations.

8 THE COURT: During deliberations?

9 MR. BUTNER: Great. Good-timing.

10 THE COURT: I know you are looking at paring
11 down and identifying who is really going to testify and all
12 of that, and those are factors in terms of what kind of dates
13 and schedules we give. Is there any leaning right now toward
14 how many days we are going to take for the whole trial that
15 is any different than what it was before?

16 MR. SEARS: If we start the trial on May 4,
17 and we commit to some version of the schedule, where at least
18 in the back of our minds we have allocated the first two
19 weeks or thereabouts for jury selection, knowing and hoping
20 that it will go faster, and then we said that there would be
21 30 trial days beyond that, and if you average, that could be
22 somewhere around eight or nine weeks, if every other week is
23 a four-day -- you know, the average would be three-and-a-half
24 days a week -- if I do that in my head. So if we wanted to
25 get to 30, that would be seven -- maybe eight weeks -- eight

1 weeks out from the middle of May, would be the middle of July
2 sometime. And start targeting that, saying jurors have
3 commitments beginning after the middle of July, we would want
4 to know. Or commitments that -- I'm sorry, the other way
5 around -- commitments that are before the middle of July.

6 THE COURT: And that is guilt-or-innocence
7 phase.

8 MR. SEARS: Correct.

9 THE COURT: In terms of penalty phase, any
10 ideas of what you are looking at if we get to that point?

11 MR. SEARS: Right. There is some break, I
12 would think, between the verdict and the second phase, and
13 then some shorter break between the second phase, which would
14 be shorter, and the third phase, and I can't imagine that it
15 would take less than a week to put on the mitigation case.

16 THE COURT: And the aggravation, Mr. Butner?

17 MR. BUTNER: Judge, it looks -- I have said
18 this kind of all along, the State's aggravation factors
19 basically are in the trial as a whole. And so I think that
20 most of the aggravation will be done at the conclusion of the
21 trial. If there is anything in addition, it may be -- I just
22 can't think of anything offhand at this juncture, quite
23 frankly.

24 THE COURT: A day or two?

25 MR. BUTNER: Yeah.

1 MR. SEARS: That is our understanding, because
2 there was a disclosure cutoff for that, and that was the
3 State's response. So we have been operating ever since on
4 the assumption that the State would not have additional
5 witnesses or evidence to present at aggravation.

6 MR. HAMMOND: Judge, there are two factors
7 here that I think are on all of our minds that would affect
8 this schedule a lot. One is that we still have not had much
9 success in paring down what the number of potential witnesses
10 are. I think we are still at around a 130.

11 MR. BUTNER: I think that is a lot of success,
12 at this juncture, quite frankly.

13 THE COURT: In any event, we are still around
14 130.

15 MR. BUTNER: We are. There is a lot of
16 witnesses, but there were roughly twice that amount when the
17 paring down took place.

18 THE COURT: And we are 20 weeks off
19 approximately from --

20 MR. BUTNER: And I fully would anticipate that
21 there is going to be some more paring down between now and
22 then. I don't know the extent of that because we are kind of
23 like sandpaper, in the finer process, at this juncture.

24 MR. HAMMOND: We just received today the 42nd
25 supplemental disclosure. We are filing today or tomorrow a

1 number of motions in limine that will be heard in January.
2 That may or may not help us pare down the length of the
3 trial, but I think it is pretty difficult for us to say with
4 any confidence how long the trial is going to take at this
5 point.

6 THE COURT: How are we coming on the mutual
7 interviews of mutual witnesses?

8 MR. SEARS: More slowly than we need to do,
9 although, the people that -- we did interviews yesterday, and
10 we are still interviewing law enforcement.

11 There are other people that the
12 interviews may not be subject to the rigorous scheduling
13 requirements and trying to find a time with Mr. Butner and
14 Mr. Sechez and we are available, and the witnesses are
15 available. And so this is the hardest part to schedule, now.
16 The rest of it, I think, will go in order. We know what we
17 have to do. We know how we are going to approach it.

18 You had offered, in a moment of
19 exuberance in May, to assist us with that, and we took it
20 just for that. And we don't know how you can realistically
21 intervene at this point to set these schedules.

22 And I will say that, other than just the
23 institutional delay in trying to get these people lined up,
24 there hasn't been any resistance from the County Attorney's
25 Office or anyone connected with the prosecution in getting

1 this done, it just takes time to get done.

2 MR. BUTNER: And just to clarify --

3 THE COURT: Is the reverse also true?

4 MR. BUTNER: Yeah. Just to clarify that,
5 Judge, I don't even have -- I can't be present at all of the
6 interviews even, and that is not really totally part of the
7 equation. I'd like to be there as much as possible.
8 Mr. Sechez is working with the defense to get these things
9 done as quickly as possible.

10 THE COURT: I recognize they haven't relieved
11 you of the rest of your caseload.

12 MR. BUTNER: Right.

13 MR. SEARS: Our biggest concern, as you will
14 see from the motions that we are about to file, has to do
15 with not only the written discovery but also ongoing
16 investigation and analysis and the way that is coming up.

17 And we have had discussions about this
18 initial DNA testing that they want to perform, and we see
19 that clock ticking and the issues surrounding that as being
20 as much or more of a problem for us going forward as the
21 interviewing of witnesses.

22 THE COURT: What is the current status on the
23 DNA retest stuff?

24 MR. SEARS: This is what I heard yesterday.
25 We were with Mr. Sechez, and he spoke with Mr. Butner, who

1 was down the hall speaking with somebody else.

2 My understanding is the one item that
3 we've talked about extensively -- 610, which is the swab from
4 the victim's shirt -- my understanding -- and correct me
5 quickly, as I know you will -- is the understanding that that
6 will be sent to the Sorenson Laboratory in Salt Lake City to
7 be examined because they will permit our experts to travel
8 from Phoenix to be there for that process. I think that is
9 the way it stands now.

10 THE COURT: And is there a timeline on when
11 that is going to happen?

12 MR. SEARS: I don't know yet.

13 MR. BUTNER: Judge, yeah, I would like to get
14 that sample. Your experts, I assume, are coming from the
15 chromosomal lab.

16 MR. SEARS: Yes.

17 MR. BUTNER: I am trying to get it
18 accomplished so that that testing can be done at the
19 chromosomal lab. Okay? That helps, doesn't it?

20 MR. HAMMOND: That would be great. But we
21 still have -- the conversation that we had last week that is
22 summarized in your order.

23 MR. SEARS: I have an update. I haven't had a
24 chance to talk with Mr. Hammond about this yet, but we had
25 conversations about this yesterday. There are an additional

1 14 or maybe 15 items that Detective Sechez has now taken to
2 the D.P.S. crime lab in Flagstaff this week for examination.
3 I was hoping that we were going to get, today perhaps, a list
4 of those items. I don't know if that is in the 42nd
5 supplemental disclosure.

6 MR. BUTNER: You won't get it today. You'll
7 probably get it tomorrow.

8 MR. SEARS: Right. A list of those items.

9 And then the rest of your order is of
10 concern to us, which was identifying what the items are, what
11 testing would be done, and the timeline for that testing.

12 And my understanding of the process, from
13 Detective Sechez, was that the lab would have these items, we
14 would know what they were. They would do one examination to
15 determine whether there was any testable material on these
16 items and stop, and then notify us of the results of that
17 examination -- yay or nay as to each object.

18 And then there would be a discussion
19 about what additional testing is proposed, so that we would
20 have an opportunity, again, to have -- and we are going to
21 have this problem, because D.P.S. will not allow our experts
22 up there. Principally, our experts need to be there if there
23 is any indication that, as there was with Item 610, that the
24 test would be destructive of all of the sample. And that
25 would have to be addressed, as we apparently are going to

1 address 610.

2 Other than that, you said, and we can't
3 dispute the general concept, that the State can test as they
4 please. We do not intend to waive and would not waive our
5 objections to the considerable lateness of this testing.
6 Some of the objects that we think are in this group of 14 or
7 15 are objects that have been in the possession of the State
8 since the first day of this case and have never been tested.

9 My understanding is these are not
10 retests. These are the first tests ever of some of these
11 objects. So there is a whole separate issue about why is
12 that. Why are we now, in December 2009, just looking at
13 testing, with the trial 20 weeks out?

14 But that is where I think we are. The
15 level of communication is significantly better than it was
16 when we first raised this issue, but I hope this process
17 doesn't break down. I hope that we are able to move forward
18 the way that I just described -- the way I understand it. I
19 think that is a reasonable approach.

20 But just so that everyone is aware, we
21 intend to come forward with objections about the time on
22 this. And then to the extent that there are further problems
23 caused by the extraction process, by the analysis process,
24 those will have to be dealt with as they are disclosed.

25 We still have issues, and we've been

1 corresponding with Mr. Butner. We still have issues that we
2 have not yet brought to the Court's attention about what we
3 consider to be a lack of complete disclosure about
4 information about the two labs -- about the crime lab and
5 Sorenson. We have gotten some information. We think it is
6 not everything we asked for. We sent out another round of
7 letters to Mr. Butner either yesterday or today, dealing with
8 those issues.

9 MR. BUTNER: I think I got them by e-mail
10 today.

11 MR. SEARS: Okay. That whole topic, Your
12 Honor, the question of continued investigation and scientific
13 examination that's been going on all of these many months,
14 that is a particular concern to us, because we see that as
15 really impacting the trial date and being prepared to go to
16 trial. We have actually no intention whatsoever of delaying
17 this trial, based on something we do or fail to do, but we
18 are being put in a precarious position because of that
19 circumstance.

20 THE COURT: Thank you. Thanks for the update.

21 What else do you think we need to discuss
22 today or do today that will move the case along?

23 MR. SEARS: I think that is all we can get out
24 in front of you today, Your Honor. Except that I -- are you
25 inclined to set some sort of a timetable for finalizing the

1 decision-making process about the questionnaire and the
2 timing of this and the degree to which you would adopt our
3 plan for doing this?

4 THE COURT: Yeah. I think it is something
5 that we can certainly discuss the second week of January when
6 you are here on those motions, and that will hopefully give
7 Mr. Butner a chance to get with you, look over what you
8 provided to him today, and see how it might be adjusted to
9 fit whatever needs he has and accommodate those, as well as
10 the defense needs.

11 The timeline, in general, as I say, is --
12 I will in the meantime see what help, if any, I am going to
13 get from the rest of the system, what happens with my other
14 cases while I am doing this case.

15 MR. SEARS: Other than allowing ample time to
16 have your makeup done for the video, I would think the only
17 other part --

18 THE COURT: I don't think there is anything
19 that can help me on that.

20 MR. SEARS: The only other piece of that would
21 be perhaps to try and find some time in April to meet with
22 counsel to look at the stipulated and requested early strikes
23 in this case. You know, we had just arbitrarily picked some
24 time --

25 THE COURT: Which is a difficult thing.

1 MR. SEARS: Those black lines are all the free
2 time that you have?

3 THE COURT: No.

4 MR. SEARS: Maybe I am just reading it
5 backwards.

6 THE COURT: I think so.

7 MR. SEARS: But that -- in terms of what would
8 actually involve you between April -- the jurors coming in to
9 fill out the questionnaires would be some time, which I think
10 could be relatively short to do the agreed-upon strikes.

11 And I would think that the sooner we
12 could do those in relation to the meetings and sessions
13 between the parties, it would make sense if we are going to
14 tell people -- you know, some group of people "you're done."
15 And if we had to get other -- if we needed more numbers. If
16 we took -- I can't imagine this happening, but if we took 225
17 questionnaires, and were looking at throwing out 150 of them
18 just on what is in the questionnaire, then we would have
19 enough people. We have operated on the assumption -- I think
20 the number that we used last week is reasonable -- that
21 somewhere between a 125 and 150 people coming into court for
22 voir dire, starting May 4, is a reasonable number. If you
23 get much smaller than that, you could run out of jurors. I
24 suspect we are going to be able to weed down from 225 to 150
25 or 125 prior to those people showing up. That is our

1 expectation based on the experience.

2 THE COURT: Well, given when the trial starts
3 and when the jury commissioner has to have the information to
4 send out the notices to those we are going to keep, I
5 think -- despite Mr. Butner's comments to the contrary
6 notwithstanding today about condensing it further than that,
7 I think we are going to have to identify who we are bringing
8 in on the first couple of days of trial in larger groups or
9 in the groups of 15 that the defense has proposed. We are
10 going to have to at least go through the jury questionnaires
11 and have whatever I need to do attended to by the 15th or
12 16th of April, to give the timeline -- maybe by the following
13 week, so there might be a little fudging in there. And
14 currently, I have trials scheduled in there. Cases settle
15 like -- some cases settle. But that's where the time crunch
16 is coming in, from my perspective, about being able to meet
17 and throw my infra mater on whoever we are excusing.

18 MR. SEARS: That makes sense, Your Honor.

19 THE COURT: But I think, in general, I like
20 the rough-out of the timeline just simply based on what the
21 jury commissioner's office is going to do.

22 MR. SEARS: I am really encouraged about what
23 Margaret said about having this relatively large pool of
24 people -- the 9-Bs -- so that we wouldn't be in this
25 confusing overlap of people that were being summoned to be

1 qualified on April 1. I didn't realize that there is a whole
2 backlog of people. I thought they did it more frequently. I
3 thought they did quarterly.

4 THE COURT: That was my impression, in fact,
5 until today.

6 MR. SEARS: That is why we come to work every
7 day, to learn things.

8 THE COURT: If there is nothing else I need to
9 attend to, I will let you get back to the other things that
10 might help in pushing the case toward the trial.

11 MR. SEARS: Thank you, Your Honor.

12 THE COURT: Our next session, for the
13 detention staff, I don't think is until the --

14 MR. SEARS: 12th of January.

15 THE COURT: Nine o'clock, on the 12th of
16 January. I think that is the next setting we have on the
17 calendar. If there is something more that comes up between
18 now and then, we will let you know.

19 (Whereupon, these proceedings were concluded.)

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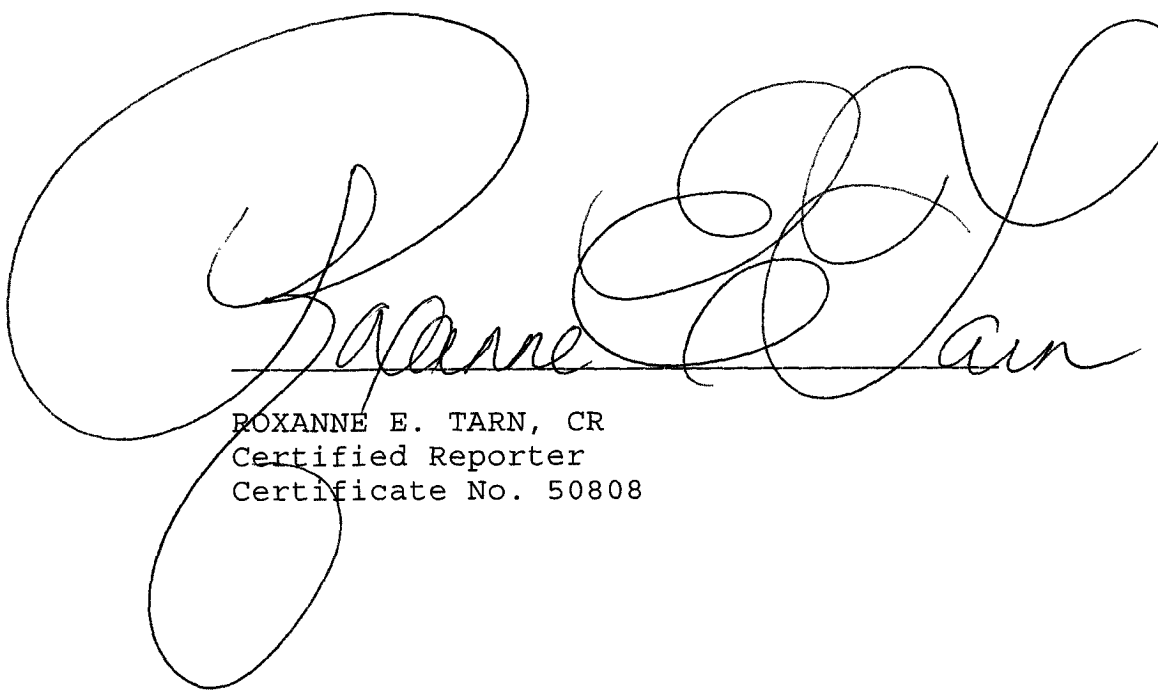
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 52 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 10th day of January,
2010.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808